creation and punishment of offences of persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List. It is further submitted that actually Parliament has no power at all to enact law on any religion or to create penal offences on ground of any religion. The power to enact such matters is reserved by Article 77 for the legislature of a State under residual power of legislation except for those aspects of Islam which are already listed in the State List. For the respondent however, Mr. T. Selventhiranathan argues that Act A549 is enacted within the legislative competence of Parliament since it is covered by item 4(h) of the Federal List which confers Parliament with the power to make law pertaining to civil and criminal law and procedure including creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.

For the applicants to succeed, they must satisfy the court firstly that leave is necessary under Article 4(4) and secondly, that they have an arguable case in that the application is not frivolous. In this particular motion, not only is the impugned law a post-Merdeka legislation but also the intended challenge is on the competency of Parliament to enact the legislation and it is not merely grounded on the impugned law being inconsistent with the Constitution. In other words, the validity of the legislation is to be challenged on the ground that it deals with a matter with respect to which Parliament has no power to make law. As such leave of the court is required under Article 4(4) [See *East Union (Malaya) Sdn. Bhd.* v. *Government of the State of Johore and Government of Malaysia*[1]; and *Ramasamy a/l Shanmugam* v. *State Government of Penang and Government of Malaysia*[2]].

On the second requirement, the first, second and third applicants were charged and found guilty under the new section 298A of the impunged legislation by the Magistrate's court at Hulu Trengganu in connection with their divisive activities amongst Muslims as unauthorised "Bilal", "Khatib" and "Imam" respectively during a Friday prayer held on May 13, 1983 at Kampung Kenanga, Wakaf Tapai, Ajil. Article 3(1) provides that Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation. Mr. Selventhiranathan contends that the constitutional right of citizens to practise their religions in peace and harmony equally applies to persons professing the Islamic religion. The applicants do not seem to disagree with this proposition but they claim that except for legislation enacted under Article 76(1) it is for the legislature of a State and not Parliament to make law in the nature of section 298A for the purpose of peaceful and harmonious practice of the religion of Islam. In the circumstances I am of the view that the present application is not frivolous and the applicants should be allowed to canvass their case before the full court on the constitutionality and validity of the new section introduced by Act A549.

Application granted.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

ARTHUR LEE MENG KWANG v. FABER MERLIN MALAYSIA BHD. & ORS.

[S.C. (Mohamed Azmi, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) March 17, 18 & 20, 1986]

[Kuala Lumpur – Supreme Court Civil Application No. 5 of 1986]

Practice and Procedure – Contempt of court – Safeguards laid down in relevant Rules of Court – Technical irregularities – Locus standi – Particularization of charge – R.H.C. 1980, O.52 – R.S.C. 1980, rr. 4 & 71(3).

Constitutional Law – Supreme Court and High Court – Protection of dignity and integrity of – Federal Constitution, art 126.

This was an application by the applicant for an order to set aside the *ex-parte* order of the Supreme Court granting leave to the respondents to commence committal proceedings for contempt and the Notice of Motion pursuant to the said leave. The objections raised may be classified under two headings *viz.* procedural and substantive. On procedural objections, the following are the summary of the alleged principal defects:

(1) The Motion does not state that it has been issued pursuant to leave granted on July 4, 1985.

(2) No Statement was before the Court on the date when leave was granted.

(3) The original documents in the *ex-parte* application including the affidavit in support were not served on the advocate.

(4) The leave has lapsed under 0.52 r. 3(2), R.H.C.

(5) There was non-observance of r. 71(3) R.S.C. 1980.

On substantive objections, the three defects alleged are:

(1) The complainants have no *locus standi.*

(2) There was an adjudication on July 4, 1985 and the order granting leave was a nullity for the reasons set out in the affidavit.

(3) The charge has not been sufficiently particularised.

Held: (1) there is a distinction in principle between cases where there have been non-observance of some safeguards laid down in Order 52, Rules of the High Court in the interest of the alleged contemnor and a mere technical irregularity. Whilst the former is fatal, the latter is not;

(2) the alleged procedural defects No. (1) and (3) are of such a nature that they are mere technical irregularities. As regards (2), (4) and (5) the objections are not well-founded;

(3) having regard to the practice of the Court, the words "entered for hearing" in Order 52 rule 3(2) of the Rules of the High Court also mean the filing of the notice of the motion. In the circumstances the leave has not lapsed since the motion was filed within 14 days after leave was granted;

(4) the general provision in rule 71(3) of the Rules of the Supreme Court regarding filing of applications does not apply in view of the specific provisions in Order 52 Rules of the High Court read with rule 4, R.S.C.;

(5) in this case the complainants as the successful parties in the two civil appeals from which the present contempt proceeding arose and their solicitors have sufficient interest in the matter to give them *locus standi*;

(6) there is no merit in the allegation that the order granting leave is null and void because the Lord President who subsequently presided at the hearing of the application for leave had earlier complained to the Bar Council and made known His Lordship's views of the merits of the case. Having regard to the prominence given by the Constitution on the Court's power to deal with contempt of itself, and in the light of the special nature of the contempt proceeding and having regard to all the circumstances of the case, there could not be any bias or likelihood of bias;

(7) having regard to the contents of the letters by the appellant himself to the appellate judges which he referred to in the statement and exhibited in the verifying affidavit, this was sufficient for the advocate to know what the alleged contempt is against him and to enable him to meet the charge and prepare his defence.

Cases referred to:

(1) *In re B (J.A) (an infant)* [1965] 1 Ch. 1112.
(2) *Cheah Cheng Hoc* v. *Public Prosecutor* [1986] 1 M.L.J. 299.
(3) *Sher Singh* v. *R.P. Kapur* A.I.R. 1968 Punj. 217, 223.
(4) *MBF Holdings Bhd* v. *Emtex Corporation* [1986] 1 M.L.J. 477.
(5) *Tan Sri Haji Othman Saat* v. *Mohamed bin Ismail* [1982] 2 M.L.J. 177.
(6) *Jelson (Estates) Ltd.* v. *Harvey* [1984] 1 All E.R. 12.

A SUPREME COURT.

Humfrey Ball (*Yap Siong Cheng* with him) for the appellant.

G. Sri Ram for the respondents.

B *Cur. Adv. Vult.*

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): This is an application of Mr. Arthur Lee Meng Kwang (hereinafter referred to as "the advocate") for an order to set aside firstly, the *ex-parte* order of this Court dated July C 4, 1985 granting Faber Merlin Malaysia Bhd. and two others (hereinafter referred to as "the complainants") leave to commence committal proceeding for contempt under Order 52 rule 2 RHC read with rule 4 RSC 1980, and also secondly, the Notice of Motion filed on July 16, 1985 pursuant D to the said leave, *vide* Supreme Court Civil Application No. 7/85.

Various objections have been raised by Mr. Humfrey Ball, counsel for the advocate which may conveniently be classified under two headings, E viz. procedural and substantive.

On procedural objections, the following are the summary of the alleged principal defects:—

(1) The Motion does not state that it has been F issued pursuant to leave granted on July 4, 1985.

(2) No Statement was before the Court on the date when leave was granted.

(3) The original documents in the ex-parte application including the affidavit in support were not G served on the advocate.

(4) The leave has lapsed under O.52 R.3(2) RHC.

(5) There was non-observance of Rule 71(3) RSC 1980.

H On substantive objections, the three defects alleged are:—

(1) The complainants have no *locus standi.*

(2) There was an adjudication on July 4, 1985 and the order granting leave was a nullity for the I reasons set out in the affidavit.

(3) The charge has not been sufficiently particularised.

Before dealing with these objections, we think the following statement of principle in the

judgment of Cross J. *In re B. (J.A.) (An Infant)*[1] is relevant for the purpose of this case:

"Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.

It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor* v. *Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.

When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question – cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects – then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding."

There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in Order 52 RHC in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under Order 52 RHC, which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the Court. [See *Cheah Cheng Hoc* v. *Public Prosecutor*].[2] Applying the above principle to the procedural objections raised in the present case, we are of the view that the alleged defects Nos. (1) and (3) are of such a nature that they are mere technical irregularities. In the case of defect No. (1), the omission to state in the Motion that it is issued pursuant to the leave granted is not fatal for the simple reason that no such motion could have been issued without leave. Further the extracted order granting leave was subsequently served on the advocate well before February 7, 1986, the date of filing of the present application. In the circumstances, no safeguard provision of Order 52 has been breached. As regards defect No. (3), the advocate was in fact served with the notice of motion (A.2) together with vertifying affidavit and relevant documents on November 20, 1985 notwithstanding the discretion of the Court to dispense with such service under 0.52 r.3(4). The contents of the verifying affidavit and the relevant documents in the *ex-parte* application (A.1) are exactly the same as those in the notice of motion (A.2). The service cannot be held to be bad merely because of difference in pagination and in the date of affidavits as they are irregularities which do not prejudice the advocate. As regards Nos. (2), (4) and (5), we are not satisfied that the objections are well founded. On No. (2), we are appalled at the serious allegation made. It is mere conjecture on the part of the advocate that the granting of leave by the Court was made in the absence of a statutory statement. After perusal of the relevant Court file and records, in particular the praecipe dated June 14, 1985 stamped on the statement, we are satisfied that the statement was before the Court during the hearing of the *ex-parte* application in July. With regard to No. (4), Mr. Humfrey Ball argues that the meaning of the words "entered for hearing" appearing in 0.52 r.3(2) is the date on which the Registrar fixed the date of hearing, *i.e.* November 9, 1985. (See letter 'JJ' in Bundle B.1). We do not agree. In our judgment, having regard to the practice of our Court, the words "entered for hearing" in that sub-rule, also mean the filing of the notice of motion. In the circumstances, the leave has not lapsed since the motion was filed on July 16, 1985, *i.e.* within 14 days after leave was granted. As regards No. (5), we rule that the general provision in rule 71(3) RSC regarding filing of applications does not apply in view of the specific provisions in 0.52 RHC read with rule 4 RSC.

Next, we deal with the substantive objections. Firstly, on *locus standi*, we think the following passage in the judgment of Mehar Singh C.J. in *Sher Singh* v. *R.P. Kapur*[3] is pertinent:

"A contempt of Court is basically an offence against the Court and not against the Judge personally and it is punishable because of the necessity of maintaining the dignity of and respect towards the Court. The power to punish for a contempt is exercised to vindicate the Court's dignity. Law reports are full of judicial decisions explaining the true purpose and wide scope and effect of the power of the superior Courts to punish for contempt and also the limits

within which a litigant is entitled to insinuate against the Courts. This power quite clearly does not depend on the personal desire of a private party whether or not to pursue the proceedings for contempt even though initiated by it. Proceedings for contempt are undisputably of quasi criminal nature. The death of the party initiating contempt proceedings would, therefore, seem to us to be of the least import. Once the proceedings get going, it quite clearly becomes a matter between the contemner on the one hand, and, the Court, of which the contempt is stated to have been committed, on the other. Contempt of Court, if I may so put it, is a mysterious and indefinable offence, being as easy to commit as it is liable to speedy and deserved punishment. Since the foundation of our present judicial system to punish for contempt is really regarded as 'of its own class' (*sui generis*), in order to keep the Courts of justice free, impartial and objective. Courts by their very creation, are vested with the inherent power, inter alia, to preserve themselves from the approach of pollution however subtly designed. With the death of the person approaching this Court with the allegation of someone having committed contempt of Court, therefore the proceedings cannot be held to cease to be competent."

In this country, the need to protect the dignity and integrity of the Supreme Court and the High Courts is recognised by Article 126 of the Federal Constitution, and similar provision is repeated in section 13 of the Courts of Judicature Act 1964. Thus, unlike in England where there is no written Constitution, the jurisdiction of this Court to deal with contempt of itself is conferred by the supreme law of Malaysia. Until different rules are made under section 16 of the Courts of Judicature Act, the procedure for contempt proceedings in the Supreme Court is governed by Order 52 of the Rules of the High Court 1980 read with rule 4 of the Rules of the Supreme Court. In addition, the Court can adopt summary contempt procedure on its own motion in cases where it is urgent and imperative to act immediately against contumelious conduct committed during its proceedings. When the contempt is not committed in the face of the Court, as is the case alleged here, it is equally important that the dignity and integrity of the Court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney-General or any private party who has sufficient interest in the matter, or even by the Court itself, although in practice it seems unjust to expect the Court to protect itself by being both complainant and judge, save in the unlikely event of the Attorney-General or the appropriate private party declining to act. In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them locus standi. (See also *MBF Holdings Bhd.* v. *Emtex Corporation Bhd.*[4]; and *Tan Sri Haji Othman Saat* v. *Mohamed bin Ismail*).[5]

Secondly, counsel for the advocate submits that the order granting leave is null and void because the Lord President who subsequently presided at the hearing of the application for leave, had earlier "personally complained to and made known to the Bar Council, Malaysia His Lordship's views of the merits of the very issue before this Honourable Court". We see no merit in this allegation. The letter written by the Honourable the Lord President to the President, Bar Council, is an administrative communication and marked "SULIT", which is distinct from the present contempt proceeding initiated by the complainants. Further, Mr. Humfrey Ball is unable to cite any authority for the proposition that the hearing of the *ex-parte* leave application is an adjudication in the real sense of the word. The only case cited before us on this point is *Jelson (Estates) Ltd.* v. *Harvey*[6] which, in our opinion, does not assist his proposition. Having regard to the prominence given by the Constitution on the Court's power to deal with contempt of itself, and in the light of the special nature of the contempt proceeding itself as indicated in *Sher Singh* case [ante], and having regard to all the circumstances of this case, we hold that there could not be any bias or likelihood of a bias. Not that it would make any difference to our conclusion, it should also be observed that the panel of the Court that granted the leave was different from the one that heard the appeals. If anything, this shows that the Court has acted with great restraint notwithstanding its wide powers. Lastly, as regards the complaint that the charge in the statement is defective in that it lacks particulars, we note that the alleged contempt in the statement is in the writing of the four letters by the advocate himself to the appellate Judges either directly or copied to them and others. Having regard to the contents of the letters which are referred to in the statement and exhibited in the verifying affidavit, we find it is sufficient for the advocate to know what the alleged contempt is against him, and to enable him to meet the charge and prepare his defence.

In the circumstances, we dismiss with costs the advocate's application to set aside the leave and the Notice of Motion.

Application dismissed.

Solicitors: *Arthur Lee & Co.; Sri Ram, Zulkifly & Kumar.*